

May 22, 2007

The Honorable James H. Harrison
Member, House of Representatives
512 Blatt Building
Columbia, South Carolina 29211

Dear Representative Harrison:

In a letter to this office you requested an opinion regarding the unauthorized practice of law. You indicated that many real estate agents in this State use a prefabricated contract for the sale of real property. It is your understanding that this contract is designed and, with the exception of the specific information for the specific transaction later filled in, written by a licensed attorney. You have questioned whether the filling in of the blanks on such a contract in association with a sale of property constitutes the unauthorized practice of law.

In responding to your question, it must be recognized that as stated in Doe v. Condon, 351 S.C. 158, 568 S.E.2d 356 (2002), the State Constitution authorizes the State Supreme Court to regulate the practice of law in South Carolina. See: South Carolina Constitution, Article V, Section 4. See also: In re Unauthorized Practice of Law Rules, 309 S.C. 304, 422 S.E.2d 123 (1992); S.C. Code Ann. § 40-5-10. As to what constitutes the practice of law, the Court in Doe stated:

The generally understood definition of the practice of law “embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts...(citing State v. Despain, 319 S.C. 317, 319, 460 S.E.2d 576, 577 (1995))...The practice of law, however, “is not confined to litigation, but extends to activities in other fields which entail specialized legal knowledge and ability”...(citing State v. Buyers Service Co., Inc., 292 S.C. 426, 430, 357 S.E.2d 15, 17 (1987)).

351 S.C. at 162. However, as noted by the Court in its decision in Doe citing In re Unauthorized Practice of Law Rules, supra,

“it is neither practical nor wise” to formulate a comprehensive definition of what the practice of law is. Instead, the definition of what constitutes the practice of law turns on the facts of each specific case.

Ibid. Therefore, as explained in Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773 (2002), the Supreme Court has refused to adopt a specific rule defining the practice of law. Referencing such, the response below by this office is only our best understanding as to how the Supreme Court would probably resolve your question realizing that the Court has the ultimate authority to make a determination on the issue.

In its decision in Franklin v. Chavis, 371 S.C. 527, 640 S.E.2d 873, 876 (2007), the Supreme Court recognized that

[t]he preparation of legal documents constitutes the practice of law when such preparation involves the giving of advice, consultation, explanation, or recommendations on matters of law...Even the preparation of standard forms that require no creative drafting may constitute the practice of law if one acts as more than a mere scrivener...The purpose of prohibiting the unauthorized practice of law is to protect the public from incompetence in the preparation of legal documents and prevent harm resulting from inaccurate legal advice.

The various scenarios before the Court in Franklin dealt with the preparation of various documents. One of the scenarios involved the filling in of probate court forms, a renunciation of right to administration and the statement of agreement to waive bond. The Court construed such documents as “probate court forms with handwritten information filled in the blanks.” 640 S.E.2d at 876. The Court stated that

[w]hile these forms do have legal implications, they are straight-forward and are provided to the public by the court...Respondent basically inserted names, addresses and dates. There is no evidence respondent gave legal advice to...(another individual)...regarding these forms. We find there is no factual support for the claim that respondent engaged in the practice of law by filling out these forms.

Ibid. The Court cited the decision in Shortz v. Farrell, 193 A. 20 (Pa. 1937) where the court had ruled that filling in simple forms which had been provided by a tribunal did not constitute the unauthorized practice of law.

Such a determination regarding the “filling in the blanks” of a document, where there was no evidence of legal advice being simultaneously provided, contrasted with other scenarios before the Court which involved the drafting of a will and the drafting of a power of attorney. As to the drafting of the will, the Court had concluded that the respondent’s actions went beyond those of a “mere scrivener” and involved the unauthorized practice of law. In that situation, the respondent had

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selected the will form, filled in the information provided by the testatrix and arranged the execution. As to another document before the court, a power of attorney, the Court found that the document “uses legal phrasing with two pages of text and is not a simple form with fill-in blanks. The document itself confers wide-ranging legal rights and would clearly require legal advice in its preparation.” 640 S.E.2d at 876. The Court found that the respondent’s actions in drafting that document also involved the practice of law.

As to real estate transactions specifically, in Buyer’s Service Co, Inc., supra, the State Supreme Court determined that the preparation of certain real estate documents by lay persons related to real estate closings, such as deeds, notes and other instruments which are related to mortgage loans and transfers of real property, constituted the unauthorized practice of law. The decision in Buyer’s Service Company, Inc., supra, however, appears to be limited to the preparation of deeds, notes and other instruments related to mortgage loans and transfers of real property associated with closings and does not appear to necessarily encompass a prefabricated contract for the sale of real property. But cf: Pioneer Title Insurance and Trust Co. v. Nevada, 326 P.2d 408 (Nev. 1958). In Pope County Bar Association, Inc. v. Suggs, 624 S.W.2d 828 (Ark. 1981), the Arkansas Supreme Court held that it was in the public interest to authorize real estate brokers to fill in the blanks of standardized, printed forms in connection with simple real estate transactions providing such forms had been previously prepared by attorneys.

Consistent with the above, in the opinion of this office, as to the situation you addressed involving the use of a prefabricated contract for the sale of real property where it is my understanding that all that is done is the mere filling in of the blanks on such a contract, it does not appear that such activity would constitute the unauthorized practice of law. I assume, of course, that absolutely no legal advice is provided or requested in association with the execution of such a contract. However, as explained earlier, the ultimate resolution of your question would be a matter for the State Supreme Court as that body is given the authority to regulate the practice of law in this State.

With kind regards, I am,

Very truly yours,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

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REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General